



DEPARTMENT OF THE ARMY
JACKSONVILLE DISTRICT CORPS OF ENGINEERS
P. O. BOX 4970
JACKSONVILLE, FLORIDA 32232-0019

November 21, 1997



REPLY TO
ATTENTION OF
Regulatory Division


Honorable John E. Albion
Lee County Board of Commissioners
2120 Main Street
Fort Myers, Florida 33901

Dear Mr. Albion:

Thank you for the continuing dialogue regarding the Environmental Impact Statement (EIS) we will develop for portions of southwest Florida. I have enclosed two documents for your consideration: a response to the 46 questions posed in Commissioner Hancock's November 7, 1997, letter; and a statement from Mr. Lloyd Pike, our District Counsel, regarding our authorization in this matter.

I want to reiterate my willingness to participate in a joint session of the Lee and Collier County Boards of County Commissioners. This would allow the Commissioners to understand my rationale and commitment to this process and would allow me to understand your concerns. Please contact me soon so that we can make appropriate arrangements. I intend to begin the EIS process before the New Year. I believe a joint meeting would be most valuable before we begin the study.

Sincerely,



Joe R. Miller
Colonel, U.S. Army
District Engineer

Enclosures

Copy Furnished:
Commissioner John Hancock



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REPLY TO
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Regulatory Division

Honorable Timothy L. Hancock
Collier County Board of Commissioners
3301 East Tamiami Trail
Naples, Florida 34112-4977

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REPLY TO
ATTENTION OF

November 21, 1997

Office of Counsel

Honorable Timothy L. Hancock
Board of Collier County Commissioners
3301 East Tamiami Trail
Naples, Florida 34112-4977

Honorable John E. Albion
Board of Lee County Commissioners
2120 Main Street
Fort Myers, Florida 33901

Gentlemen:

I understand from conversations with you that your fellow county commissioners would like a statement from me as to the legal authority upon which the U.S. Army Corps of Engineers bases its proposal to proceed with an Environmental Impact Statement ("EIS") covering portions of Lee and Collier counties.

The U.S. Army Corps of Engineers district commanders are entrusted with broad authority with respect to the Corps regulatory permit decisions. In fact our regulations require them to consider "the probable impacts, including the cumulative impacts, of the proposed activity and its intended use on the public interest." 33 C.F.R. § 320.4(a)(1). This evaluation involves a careful weighing of all those factors which become relevant in each particular case, *i.e.*, the benefits which reasonably may be expected to accrue from the proposal must be weighed against its reasonably foreseeable detriments. 33 C.F.R. § 320.4(a)(1). The decision should reflect the national concern for both protection and utilization of important resources. "All factors which may be relevant to the proposal must be considered including the cumulative effects thereof including:

conservation, economics, aesthetics, general environmental concerns, wetlands, historic properties, fish and wildlife values, flood hazards, floodplain values, land use, navigation, shore erosion and accretion, recreation, water supply and conservation, water quality, energy needs, safety, food and fiber production, mineral needs, considerations of property ownership and, in general, the needs and welfare of the people.

33 C.F.R. § 320.4(a)(1).

Such broad discretion can only be exercised in a context of knowledge. In southwest Florida, Corps commanders are asked with increasing frequency to authorize the placement of fill in jurisdictional wetlands. Colonel Rice and now Colonel Miller have expressed concerns about the Corps' lack of a comprehensive base of knowledge to aid them in understanding and evaluating the individual impacts of some proposed projects and the cumulative effects of the total volume of wetland impacts they are being requested to authorize. Colonel Miller, for example, currently has before him requests to authorize the placement of fill in over 3,500 acres of jurisdictional wetlands in Lee and Collier counties. The District is also considering the issuance of a general regional permit for appropriate fill activities in Lee and Collier counties to allow our staff to concentrate their efforts on areas of the most critical environmental concern.

To support the District Engineer's decisions on these matters in full compliance with federal law, the Jacksonville District is committed to preparing an EIS to analyze potential environmental impacts anticipated to result from the proposed actions. The EIS is required by the provisions of the National Environmental Policy Act of 1969, ("NEPA"), 42 U.S.C.A. § 4321 through 4370b. Other federal laws which require and elaborate upon the requisite environmental review include, *inter alia*: the Endangered Species Act, 16 U.S.C.A. 1531 *et seq.*; federal regulations promulgated pursuant to NEPA by the Council on Environmental Quality ("CEQ") at 40 C.F.R. § 1500 through 1517; Corps regulations at 33 C.F.R. § 320 through 325; and Environmental Protection Agency ("EPA") Clean Water Act § 404(b)(1) Guidelines at 40 C.F.R. § 230.

Section 102 of NEPA requires all agencies of the Federal Government to include in any proposal for "major federal actions significantly affecting the quality of the human environment" a detailed statement on:

- (i) the environmental impact of the proposed action,
- (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
- (iii) alternatives to the proposed action,
- (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
- (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

The Jacksonville District Commander is facing decisions that constitute "major federal actions significantly affecting the quality of the human environment" under NEPA. The terms of this phrase are explained in the NEPA regulations promulgated by the CEQ. These regulations are binding upon federal agencies and require them to administer their programs in accordance with NEPA. 40 C.F.R. § 1507.1. "Major Federal action includes actions with effects that may be major and which are potentially subject to federal control and responsibility. Major reinforces but does not have a meaning independent of significantly." 40 C.F.R. § 1508.18. Federal actions include approval of projects by permit

or other regulatory decision as well as federal and federally assisted activities. 40 C.F.R. § 1508.18.

"Significantly as used by NEPA requires considerations of both context and intensity." 40 C.F.R. § 1508.27. "Context" means society as a whole; and the affected region, interests, and locality. 40 C.F.R. § 1508.27(a). "Intensity" means severity of impact. Decisionmakers are directed to consider: both beneficial and adverse impacts of a proposal; the degree to which it will affect public health or safety; unique geographic characteristics such as wetlands and ecologically critical areas; the degree of controversiality; the degree of uncertainty of risks; the precedent-setting nature of the decision; "whether the action is related to other actions with individually insignificant but cumulatively significant impacts"; the degree of adverse affect upon cultural resources; the degree of adverse affect upon endangered or threatened species or its critical habitat; and whether the proposal threatens violation of other laws for protection of the environment. "Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts." 40 C.F.R. § 1508.27(b).

The CEQ regulations make it clear that agencies should utilize opportunities to lessen the burden of expense and delay that would occur if each proposal for federal action (the grant or denial of a permit authorization) were looked at separately. Agencies are encouraged to reduce delay by integrating NEPA into early planning, by using the scoping process for early identification of issues, and by preparing EISs early in the decision-making process. 40 C.F.R. § 1500.5.

The primary purpose of an EIS is to serve as an action-forcing device to insure that the policies and goals of NEPA are infused into an agency's actions. It must provide full and fair discussion of significant environmental impacts and inform decisionmakers and the public of reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment. 40 C.F.R. § 1502.1.

There are many other federal laws and regulations addressing the necessity for a district engineer to inform himself of the environmental consequences of his actions. See Corps regulations at 33 C.F.R. § 320.3. However, within the context of southwest Florida one of the most critical is the Endangered Species Act. Section 7(a)(2) of the Act requires every federal agency, in consultation with the assistance of the U.S. Fish and Wildlife Service, to insure that any action it authorizes, funds, or carries out in the United States is not likely to jeopardize the continued existence of any listed species or modifies or destroys its critical habitat. Regulations promulgated for the Act state that an "action" includes the granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid; and actions directly or indirectly causing modifications to the land, water, or air. 50 C.F.R. § 402.02 (1993). The "effects of the action" refers to the

direct and indirect effects of an action on the species or critical habitat, together with the effects of other activities that are interrelated or interdependent with that

action, that will be added to the environmental baseline. The *environmental baseline* includes the past and present impacts of all Federal, State, or private actions and other human activities in the action area, the anticipated Federal projects in the action area that have already undergone formal or early section 7 consultation, and the impact of State or private actions which are contemporaneous with the consultation in process. *Indirect effects* are those that are caused by the proposed action and are later in time, but still are reasonably certain to occur. *Interrelated actions* are those that are part of a larger action and depend on the larger action for their justification. *Interdependent* actions are those that have no independent utility apart from the action under consideration.

50 C.F.R. § 402.02 (1993) (Emphasis added.).

I have concluded from the above and from the concerns expressed by my commanders and their regulatory personnel that there is both authority and, in fact, a duty to seek such environmental information as will enable them to legally and effectively exercise their discretion to issue or deny Corps permits for projects that propose and depend upon the placement of fill in waters of the United States.

I hope that this discussion of authority assists you and your fellow commissioners.

Sincerely,

A handwritten signature in cursive script, appearing to read "Lloyd D. Pike".

Lloyd D. Pike
District Counsel

Answers to Questions Posed by Commissioner John Albion of Lee County

1. When, in your opinion, is an EIS required under NEPA?

An Environmental Impact Statement should be included "in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment." National Environmental Policy Act of 1969 ("NEPA") § 102, 42 U.S.C.A. § 4332 (1994).

2. Does NEPA require an EIS when there is "major federal action" and a significant impact on the quality of the human environment?

Yes.

- 3a. Are there requirements other than major federal action and a significant impact on the quality of the human environment that must be met before an EIS is required?

No.

- 3b. Do you agree that both are necessary to require an EIS?

Yes.

4. What major federal action exists that compels the ACOE to do an EIS?

Various Corps activities or proposals could constitute "major Federal action" under NEPA, which, if combined with the requisite significant impacts could trigger a requirement to prepare an EIS. Applicable here is the Corps Regulatory Division's consideration of permits under § 404 of the Clean Water Act, 33 U.S.C.A. § 1344 (1986) and § 10 of the Rivers and Harbors Act of 1899, 33 U.S.C.A. § 403 (1986).

5. Isn't a major federal action typically a project that is done with federal funding, or a project that occurs on federal land, like the cutting of timber in the National Forest or the funding of a major roadway with federal highway dollars?

No. Under NEPA, a Federal agency's consideration of potential environmental impacts is not restricted solely to federally financed and/or constructed projects. Regulatory agencies with congressional mandates to administer permitting programs must consider the potential environmental consequences that would result from the implementation of the permittees' proposed projects.

6. What federal funds or federal lands are being used for a project in Lee County that warrants an EIS?

Please see answer to question 5. Federal funds are not required, nor are they necessarily relevant, to a requirement for a Federal agency to prepare an EIS.

- 7a. If the airport expansion, which is being done with some federal funds, is the project, how can the ACOE do the EIS before the application is submitted?

The Corps does not usually prepare an EIS until it has a permit application. However, we are now facing a situation in Lee and Collier counties with many recurring permitting issues and many projects in the early stages of permitting, or in the pre-application stage (e.g., Florida

Rock, University Village, M&R Ranch, as well as the regional airport), any one of which could require and EIS, and some of which certainly will require an EIS.

7b. Why isn't this speculative?

Because applications for Corps permits to fill over 3,500 acres of wetland area in Lee and Collier counties are currently in hand and more are expected.

7c. Can the ACOE do an EIS based on a speculative project?

No. The Corps would have no reason to do an EIS on a purely speculative project. Nor, is one required. See *Kleppe v. Sierra Club*, 427 U.S. 390 (1976)

8. If the airport expansion is the major federal project, why can't the scope of the EIS be limited to the effects of the airport expansion and the geographical area that would be impacted by the airport expansion?

The airport expansion proposal is not the only proposed project in the southwest Florida region that the Corps is currently considering. NEPA regulations encourage agencies to organize environmental statements so as to evaluate multiple potential impacts to a geographic area. Council on Environmental Quality ("CEQ") Regulations at 40 C.F.R. Part 1502.4(c).

9a. If the airport expansion is the major federal project, why doesn't the MOU include language which indicates that the airport will not have to do another EIS when it submits for permits?

Such language could be added to the MOU, but it isn't necessary. A new EIS will not be required if the airport proposal is fully considered in the EIS and: (1) if the project as submitted in the application is essentially the same project considered in the EIS, and (2) if the cumulative and secondary impacts studied in the EIS are essentially unchanged. Even if the above factors should change, usually, only a supplementary document might be required.

9b. If the airport expansion is the basis for the EIS, why isn't the airport master plan the preferred alternative?

As an agency we don't have a preferred alternative. NEPA regulations do not require identification of the agency's preferred alternative (40 C.F.R. § 1502.14(e)) and the implementing regulations for the Corps Regulatory Program discourages it (33 C.F.R. § 325, Appendix B, part 9.b(5)).

9c. If the airport is the federal project, what impact does the airport have on Collier County that would require Collier County to execute the MOU?

No one is "required" to execute the MOU. Collier County was invited to be a signatory to the MOU because it currently is undergoing significant growth in areas that share many of the same environmental characteristics and prospective impacts as the airport property. The airport is a regional facility to service both counties.

10. As the MOU is currently written, wouldn't the airport still have to do its own EIS when the project is funded and permitted? Why or why not?

Please see answers to question 9.

11. What is (or are) the significant impact(s) to the human environment that is of concern to the ACOE and is the basis for the need to do the EIS?

Primarily, the Corps is concerned with issues of water quality, wetland loss and mitigation, navigation, and issues arising under the Endangered Species Act. However, since the word "environment" encompasses all factors that affect the quality of life, the Corps must consider impacts extending beyond the natural environment of rocks, trees, and streams. These impacts include induced changes in patterns of land usage, population density and crowding, increased automobile and pedestrian traffic, air and noise pollution, increased demands on sanitary sewer systems and gas and water services, crime, and socio-economic consequences on industrial and commercial growth.

12. Doesn't the ACOE already have an obligation to consider the impacts on the environment through the discharge of its responsibilities under Section 404 of the Clean Water Act?

Yes.

13. Can you identify other instances where the ACOE has been required by a court of law to conduct an EIS for private projects on private land based solely on the cumulative impact of one or more dredge and fill permits?

This question makes several false assumptions: (1) the Corps is not under a court order to prepare an EIS for a southwest Florida project; and (2) we are dealing with a mix of many projects, some private on private lands and some with varying degrees of local, state, and federal governmental involvement. Another critical factor—which limits the numbers of cases in the category you create—is that cases brought to challenge a federal agency's NEPA compliance are generally brought by third-party environmental interests or by other governmental agencies; and they usually involve projects with some governmental involvement in addition to that of permitting or licensing, or they involve government lands. Federal courts do not initiate actions to mandate federal agency preparation of EISs. Following is a sampling of "private" or "semi-private" cases:

The court required the Forest Service's EIS for a permit application from a private mining concern to reopen road passing through private and public lands to consider secondary and cumulative impacts of traffic and the operation of the mine on the habits and continued well-being of Bighorn sheep. *Foundation for North American Wild Sheep v. U.S. Dept. of Agriculture*, 681 F.2d 1172 (9th Cir. 1982);

The court required the Corps to prepare a detailed EIS for a private marina project on private land to consider multiple secondary and cumulative impacts of foreseeable accelerated upland development on the environment. *Conservation Council of North Carolina v. Costanzo*, 398 F. Supp. 653 (E.D.N.C. 1975), *aff'd* 528 F.2d 250 (4th Cir. 1975);

The court enjoined the Corps from issuing a permit in connection with the development of a private industrial park and port per an environmental group's challenge to the adequacy of its secondary impact evaluation. *Sierra Club v. Marsh*, 976 F.2d 763 (1st Cir. 1992);

The court required the Corps to conduct a public interest review to consider the cumulative effects of issuing permits to a realty company to erect structures in navigable waters; the court found that state and private plaintiffs failed to establish a showing to bring the challenge under NEPA. *Dardar, et al., v. LaFourche Realty Co., Inc.*, 639 F. Supp. 1525 (E.D. La. 1986) and Civ.A. No. 85-1015 (E.D. La.) (Apr. 27, 1988) at 1988WL 40268;

The court required the Corps and the Natural Resources Soil Conservation Service to prepare an EIS for construction of a dam by local soil conservation district and towns. The EIS was to

consider the foreseeable adverse impact of zebra mussel infestation on waterways. *Hughes River Watershed Conservancy v. Glickman*, 81 F.3d 437 (4th Cir. 1996);

The court required the Corps to prepare a programmatic or "umbrella" EIS to consider the cumulative impacts of multiple similar projects to discharge dredged spoil pursuant to the Marine Protection, Research and Sanctuaries Act. *National Wildlife Federation v. Benn*, 491 F. Supp. 1234 (S.D.N.Y. 1980); and

The court enjoined permits and required federal and state agencies to prepare an EIS in connection with a city's permits for improvement projects to a regional airport; the various projects had to be considered together and the environmental effects to a neighboring state had to be analyzed. *Citizens for a Responsible Area Growth (CRAG) v. Adams, et al.*, 477 F. Supp. 994 (D.N.H. 1979).

14a. Why doesn't the MOU indicate that the comprehensive plans of the two counties are the ACOE's preferred alternatives?

The Corps has no preferred alternative and the MOU identifies the counties' and the State's preferred alternative, which consists of the counties' comprehensive plans.

14b. Why does the MOU only indicate that the adopted comprehensive plans are the preferred alternative of the state and the counties?

The counties and the state preferred this language as a means of sharing that they had already gone through a comprehensive process to determine what their growth patterns should be.

15a. What is a "consensus" alternative?

Under Appendix A.1.5. of the proposed MOU, it is an alternative agreed upon by the members of the Alternative Development Group (ADG).

15b. What is it an alternative to?

It is an alternative to other alternatives to be analyzed in the process.

16. Since there isn't any proposed permit or action in this case, what does the ACOE assume to be the project for purposes of considering alternatives?

The question erroneously assumes that there is no proposed permit action. There are indeed several pending permit applications, some of which will require an EIS. The locations of these are identified, in particular, by the various projects in pre-application and application status and, in general, by the Future Land Use maps of the County Comprehensive Plans. Moreover, there is a certainty of additional applications for similar permits to fill Corps jurisdictional wetlands as a consequence of the phenomenal growth being experienced by Lee and Collier counties.

17a. Who are all of the participants in the creation of the "consensus" alternative?

The participants are the members of the ADG. Under Appendix A.1.5. of the proposed MOU, the ADG would consist of members of the public who reside in Collier and Lee Counties; representatives of governmental agencies and other organizations may be ex-officio advisors to this group.

17b. How is a consensus reached if all of the entities with divergent opinions don't come to any meeting of the minds?

If that is the case, there will not be a consensus alternative. A consensus will be attempted, if possible. It is possible that after a fair and open exchange of opinions and ideas that a consensus could be reached on some, if not all, areas of concern. If not, then the area(s) of difference will be reported.

17c. How much do the opinions of the respective counties weigh in the consideration of the alternatives?

There is no precise formulation.

18. Will the ACOE refuse to issue permits for any dredge and fill permit which is inconsistent with the "consensus alternative"?

The standards for Corps permit issuance and denial are contained in Title 33 of the C.F.R., and those criteria will be applied.

19a. Will the ACOE, as part of the EIS, consider development only in wetland areas which are under the ACOE's 404 jurisdiction?

Applications, both pending and anticipated, for placement of fill in wetlands and the impacts of that fill are the focus of this EIS.

19b. Is the ACOE considering developing an EIS which affects uplands?

The assessment may include concern for certain issues or impacts that occur on uplands, for example, adverse effects to endangered species or archeological and cultural resources.

19c. If the ACOE is going to address development within the uplands, how does the ACOE propose to do this since it is outside the jurisdiction of the ACOE?

One example might be where development in uplands results from or is dependent upon wetland fill.

20a. Who will establish the methods and procedures for conducting the EIS?

These are largely prescribed by federal laws and regulations applicable to the Corps of Engineers and to other federal agencies.

20b. Won't this be established solely by the ACOE with input from the Council for Environmental Quality?

The Corps and all federal agencies must follow the rules issued by the CEQ.

20c. Won't the counties input be considered with the same deference as any other input from the public?

There is no precise formula for giving weight to input. Input of elected county officials, for example, must take into account that they are speaking for their electorate. Everyone with environmental data is invited to give input.

21a. The ACOE has indicated that they want the counties to assist, which the counties have indicated they will do. What kind of assistance does the ACOE want?

First, we would like staff assistance in understanding the Comprehensive Plans and to ensure those plans are correctly interpreted when they are assessed. Secondly, we would like them to

provide background knowledge in developing a suite of alternatives. Finally, we would like them to provide professional knowledge in preparation of the assessments of these alternatives.

21b. Why is a MOU necessary to secure that assistance?

Actually the MOU was to clarify the expectations and roles of the parties. The MOU is probably not as important since the counties appear to be more comfortable with a traditional EIS process.

22a. Doesn't all of the decision-making authority for the scope and substance of the EIS rest with the ACOE?

The decision must be made by the Corps with consideration of appropriate public and agency input as required by law and regulation.

22b. Will either of the counties have any decision-making authority relative to the EIS by virtue of the execution of the MOU?

They would have become direct partners in the decisions related to the process of preparing the documents and in the preliminary preparation and review of draft documents.

23a. Various members of the County Commission have heard rumors to the effect that one of the primary reasons why the ACOE wants to do the EIS is because the National Audubon Society has threatened to sue if the ACOE doesn't do an EIS. Is there any truth to this rumor?

No.

23b. Could you please share with us as exactly what is going on regarding the National Audubon Society's involvement in the request for an EIS?

The National Audubon Society is simply one of many groups that has expressed support of the Corps' decision to prepare an EIS.

23c. If you do an EIS because they want you to, will the ACOE also feel compelled to adopt the scope and ultimate EIS that the National Audubon Society wants?

This is a misleading and hypothetical question. The Corps does not prepare EISs simply because an organization requests one. The EIS scoping process is a public process. Members of the public, including organizations, may participate and submit information. The Corps develops the scope of the EIS, which may or may not compare to that which is proposed by any interested party.

23d. Is the National Audubon Society, or any other national environmental group, contributing any funds or providing any technical assistance to the EIS?

None are contributing any funds. Groups may or may not choose to provide environmental data or technical input. The general public as well as any and all interested parties are invited to do this.

24a. Can the National Audubon Society, or any other national environmental group, challenge the scope or challenge the final EIS?

Yes.

24b. What is the burden of proof or the standing needed to challenge the decision not to do an EIS?

24c. What is the burden of proof or the standing that must be established to challenge the scope of the EIS?

24d. What is the burden of proof or the standing that must be established to challenge the results of the EIS?

For 24b,c, and d, generally, a plaintiff must demonstrate to the court that he has been injured in fact by the Corps' action or inaction. This injury can include aesthetic injuries, injuries to the enjoyment and use of the environment, as well as more traditional injuries such as economic injury.

25a. Is the Memorandum of Understanding binding and legally enforceable?

No. In fact, as stated above, it was only a means of expressing the expectations of the parties. Any party would have been able to withdraw at any time.

25b. Does the MOU give the County any binding control or input into the EIS scope or study?

It was, as stated above, not intended to be binding. Input of an environmental nature is encouraged and welcomed from any interested party or from the general public.

25c. If the ACOE really wants the County to be a partner, why wouldn't the ACOE want to enter into a Memorandum of Agreement?

The partnership proposed, as noted above, was not intended to be a formalized in a binding legal document, only through an understanding on procedures and process.

25d. What is the difference between a MOU and MOA?

That depends on the intent of the parties and the drafters of the document. Many would argue that they can be identical, while others would make distinctions.

26a. A representative of the ACOE indicated that the flooding problem in south Lee County is the major federal action that requires the EIS. If so, how much and through what grant, allocation, etc.?

26b. Is the study currently being conducted by the South Florida Water Management District being done with any federal funds?

We understand that the SFWMD is contemplating a flood control project in southwest Florida. It is better to ask SFWMD about their projects and funding.

26c. What federal permits are needed to undertake the work proposed by the District to reduce flooding?

Generally, flood control activities may require permits from the Corps under either Section 10 of the Rivers and Harbors Act of 1899 or Section 404 of the Clean Water Act, or both.

26d. If the study isn't complete and no recommendations have been made yet, how has the ACOE determined that federal permits are needed?

See answer above.

26e. If no federal permits are needed, no federal funding is being used, and none of the improvements are being done on federal lands, what is the major federal action?

If all of the assumptions of this question are correct there probably would not be a "major federal action."

26f. What significant effect on the quality of the human environment is anticipated from a project that is aimed at rectifying a flooding problem?

A project to alleviate flooding would foreseeably affect numerous residential and commercial activities undertaken by citizens in the floodplain area as well as wildlife, wetlands, water quality, and public health and safety.

26h. Isn't the SFWMD trying to rectify some of the alterations to the water flow that occurred prior to SFWMD permitting, which is purportedly one of the contributing factors to the flooding?

This question is better put to the SFWMD.

27a. The ACOE has also indicated that it is the cumulative impact of several dredge and fill permits that creates the need for an EIS. Is the ACOE referring to past permits?

Some regulations require the Corps to consider past impacts.

27b. Is the ACOE referring to speculative future permits?

No. The Corps is referring to permit applications in hand and projects in the pre-permitting stages.

27c. Exactly what grouping of permits create the major federal action?

No grouping is necessary.

27d. Doesn't the ACOE already consider the impact on the environment when it issues dredge and fill permits?

Yes.

27e. Doesn't the ACOE already consider impact on habitats through its consultation with the U.S. Fish and Wildlife Service?

Yes.

27f. Doesn't the ACOE already consider the public interest?

Yes.

27g. Doesn't the ACOE already require minimization of impacts?

Yes, but only following its determination that the impacts cannot be avoided.

27h. Doesn't the ACOE already analyze the secondary and cumulative impacts of every permit request?

Yes.

27i. Didn't the ACOE require Lee County to provide over a million dollars in CREW lands to address the secondary and cumulative impacts of Treeline?

The Corps does not require that permit applicants purchase lands for offsite mitigation of project impacts, and it does not favor offsite mitigation. Mitigation sequencing under Clean Water Act §

404 requires that proposed project impacts be first avoided, then minimized, and finally, if they are unavoidable, that they be compensated for. In the Treeline Avenue permit, after proper sequencing, offsite mitigation was offered and accepted. An amount of \$300,000 was targeted by Lee County toward the purchase of offsite lands for the portion of Treeline Avenue permitted by the County. The Corps did not require or receive the funds.

27j. Is the ACOE required to do an EIS when the environmental questions that would be asked and answered through the EIS are already answered during the normal permitting process?

These are two separate processes required by two separate laws.

27k. If the answer to the last question is yes, could you please explain why and include the legal basis for that response?

Please see response to 27j. Please see NEPA §§ 2, 101, 102; CEQ Regulations at 40 C.F.R. Parts 1500, 1502, and 1505; Corps permitting regulations at 33 C.F.R. Parts 320 and 325; and EPA 404(b)(1) Guidelines at 40 C.F.R. Part 230.

28a. Why can't the ACOE agree to the scope of the EIS now?

Under Corps regulations 33 C.F.R. Part 325, Appendix B, and NEPA regulations at 40 C.F.R. § 1501.7, the Corps must invite the participation of affected governmental and tribal agencies and obtain public comment prior to making that decision.

28b. What issues does the ACOE expect to include in the scope?

The Corps has publicly described several issues. These may or may not be included in the final scope.

28c. What geographical area does the ACOE expect to include in the scope?

That geographic area will be identified as a result of the process prescribed by the references listed in the answer to 28a.

28d. What are the factors that would cause the list of issues or the geographic area to expand?

The EIS process will determine the actual issues and actual geographic area the Corps needs to review. The public comments will assist the Corps' identification of those needs and topics requiring greater disclosure.

28e. Why can't the ACOE do the scoping effort prior to asking the County to execute either an MOU or an MOA so the County will know all the terms of the agreement?

The Corps can do the scoping process without County execution of the MOU.

28f. Why doesn't the ACOE want to do the scoping effort first?

The Corps has expressed an intention to move forward with the scoping process.

29a. What effect will the EIS have on future ACOE permitting?

The EIS will provide information that will be available to be incorporated into the decision-making process of future permit applications.

29b. Will the EIS have an affect on any other regulatory agency?

Hopefully, other agencies will find our data useful and it will shorten the time, lessen the expense, and improve the environmental information available for their actions. By CEQ regulations, other federal agencies are required to utilize an EIS prepared by another federal agency if appropriate, in order to avoid duplication.

30a. Is there any case law or precedents that provide that the issuance of several dredge and fill permits in a given geographic area rises to the level of a significant environmental impact?

It isn't necessary for there to be several. One permit can, and frequently does, rise to the level on a significant environmental impact. One example follows: (Court required Corps to prepare a comprehensive or programmatic EIS to cover an entire ocean dredged spoil site. Court held that the cumulative impacts of several proposed actions pending at the same time must be considered together) *National Wildlife Federation v. Benn*, 491 F. Supp. 1234 (S.D.N.Y. 1980).

30b. Is there any case law or precedents that provide that the issuance of several dredge and fill permits in a given geographic area does not rise to the level of a significant environmental impact?

30c. Could you please provide us with the particulars of no less than five of these examples?

Our preliminary research reveals none.

31. If the ACOE has determined that an EIS is warranted and lawful, why does the ACOE want or need Lee County to execute an MOU?

The Corps does not need the MOU, and it plans to prepare an EIS.

32a. How much money does the ACOE submit it will cost to do an EIS?

The current Corps estimate provides for facilitation services for the ADG, funding of administrative/technical assistance (hopefully some from the SFWMD), Corps staff labor and travel, printing, and miscellaneous costs such as for public meetings, and contingency. The Corps estimate is \$370,000. The USEPA and USFWS are estimating additional costs for work related to their support. This will be further refined after the scoping process.

32b. How much money does the ACOE have budgeted to do the EIS?

The Corps has budgeted its portion of the estimate.

33. If it takes longer than 18 months, and the County executes the MOU, what recourse does the County have against the ACOE for the delay?

Their recourse would be help work through the delay or to stop participating.

34a. Supporters of the EIS submit that the only thing that will change if the EIS is done will be a new requirement to avoid off-site impacts and to mitigate for unavoidable impacts. Will this be the only result?

It is impossible to say at this point.

34b. Doesn't the ACOE already require mitigation for unavoidable impacts?

Yes.

34c. Doesn't the ACOE already consider off-site impacts in its consideration of secondary and cumulative impacts?

Yes.

35a. Is the ACOE submitting that it has done a poor job in the review and issuance of permits?

No.

35b. The County's observation is that the ACOE has done a very thorough job and has very zealously exercised its responsibility to protect the public. This leads to the question of, what permits has the ACOE issued in Lee and Collier County where the ACOE didn't do a good job and where there was a significant environmental impact on the quality of the human environment?

We are gratified by the County's observation. We hope to continue to do our job well, and the proposed EIS is a very important component of doing this.

36. Will the EIS result in any required changes to the comprehensive plans of the counties?

No. The EIS will not require changes to the Comprehensive Plans. Changes are made under state law.

37. What conflicts or inconsistency exists between the actions of the ACOB and Lee County if Lee County doesn't issue final permits until ACOE and SFWMD permits are obtained?

The Corps makes its decision on its permit after balancing multiple public interest factors. One of these factors is whether or not the proposed activity affects local land use matters. The Corps ordinarily relies on the County's determinations.

38a. How will the EIS result in an absence of water shortages?

38b. How will the EIS result in an absence of water restrictions?

The EIS will not directly drive action on these issues. The EIS is a decision-making tool which provides information and analysis for decision makers.

38c. These are two of the results promised as a result of the EIS by supporters and it would be helpful to understand how this will occur as a result of the EIS.

See answer above.

39. Please identify what the ACOE submits is the deficiency in the amount of land set aside by Lee and Collier counties for preservation and open space?

The Corps has no opinion on that.

40. What is the difference between a PEIS and an EIS?

A PEIS is a programmatic EIS, which is a form of broad EIS organized to cover a program. A program may consist of a group of concerted actions to implement a specific policy or plan or it may consist of systematic and connected agency decisions allocating agency resources to implement a specific statutory program or executive directive. 40 C.F.R. § 1508.18. A broad EIS may also be organized geographically, generically, or technologically and may include proposals from many agencies. Any broad EIS is often referred to as a PEIS. A PEIS is generally performed for review at the start or modification of a program. It provides an overview

and focuses on the process and ramifications of the decisions from that process. Individual permit decisions are not usually made from a PEIS because it does not include the necessary level of detail. Subsequent EISs or EAs will "tier down" or consider specific actions under the PEIS umbrella. In this case an EIS is proposed for the purpose of increasing the comprehensiveness of information available for decisions being made under an existing process.

41. Why doesn't the MOU include a commitment to provide for a general permit?

The MOU made clear that the Corps hopes that the information and analysis in the EIS will provide the basis for a General Permit. Until the EIS is completed, we simply do not know if the basis exists to craft one.

42a. What is the basis for the contention that the environment will receive less protection in the future than what the law requires?

We expect that the federal and state governments will continue to enforce their laws.

42b. Is the MOU suggesting that the Counties aren't providing the required protection or that the ACOE won't provide the required protection, and why?

No.

43. Don't both the ACOE and the SFWMD, as the designee of DEP, review and evaluate the impacts of development on wetland?

Yes.

44a. The MOU indicates that alterations to historical drainage occurred prior to the current regulatory scheme, exotic infestation is spreading, and the need and opportunity for restoration of those areas should occur as mitigation for unavoidable impacts. Doesn't the ACOE already require restoration, along with the SFWMD, of areas that are negatively impacted as part of its mitigation requirement?

Our mitigation focuses on compensating for unavoidable wetland impacts. That mitigation may or may not involve restoration of historically drained areas. We cannot speak for SFWMD.

44b. Did you know that Lee County has already adopted a requirement which requires the removal of exotic species when a tract is developed, including the removal from any conservation and open space areas?

Yes.

44c. What deficiencies in the current restoration work require the EIS?

None.

44d. What do you anticipate will change in this regard due to the EIS?

That would be sheer speculation. The EIS will provide additional environmental data for decisionmaking and may identify environmental restoration opportunities that would be appropriate for mitigation.

45a. Does the ACOE expect to identify large areas of Lee and Collier County as large mammal corridors that should be reserved for those animals with little or no development?

At this pre-scoping stage, the Corps has no pre-conceived expectations.

45b. Will the ACOE or the federal government be responsible for providing the land owners with compensation for the conversion of their land to animal habitat for the benefit of the public?

The EIS does not cause the conversion of any land.

45c. If the ACOE or federal government is not going to compensate the landowners, who will?

As stated above, the EIS does not convert the use of any land.

46a. What are the subsequent steps after the study that lead to the use of the study in regulatory and other decisions?

Corps decisionmakers will have the data produced by the study available as they prepare Records of Decision on subsequent federal actions. An example is the anticipated development of a Corps general permit. Other agencies may also incorporate information from the EIS into their decision-making processes.

46b. What regulatory decisions?

For the Corps, decisions under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act of 1899.

46c. What other decisions? This question is based on paragraph 1.12, please refer to that paragraph for these terms.

Any decisions which would be facilitated by a comprehensive understanding of the environmental resources of the study area.

**Major Projects in Lee & Collier Counties
Requiring Department of the Army Permits**

Permitted:

Florida Gulf Coast University
Treeline Boulevard
Timberland & Tiberon
Corkscrew Pines
Wildcat Run
The Habitat
Corkscrew Road
Airport Runway Extension
Daniels Boulevard Extension
Estero pointe
River Ridge
M & A Ranch
Woodlands
Immkokalee Canal
Miller Boulevard
Naples National
Lely
Falling Waters
Brooks of Bonita Springs

Under Review:

Florida Rock Mine Expansion
University Village
Pelican Landing
Lely Lakes
Village of Sable Bay
Mule Pen Quarry
951 Land Holdings Joint Venture
Miromar Village

Anticipated:

Water Management District #6
Airport Expansion (Second Runway)
M & R Ranch
I-75 Interchange(s)
Treeline (SR951) Extension